STATE OF MICHIGAN

COURT OF APPEALS

DAVID L. HUNT,

Plaintiff/Counter-Defendant-Appellee,

v

CHERYL A. HUNT,

Defendant/Counter-Plaintiff-Appellant.

UNPUBLISHED
June 12, 2007

No. 272337
Jackson Circuit Court,
Family Division
LC No. 05-004880-DM

Before: Markey, P.J., and Sawyer and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right the judgment of divorce. We affirm.

Defendant first argues that the trial court failed to consider her greater financial needs when dividing the marital estate, specifically, her inability to earn an income equal to plaintiff's income and her contributions to plaintiff's business during the marriage. Defendant asserts that, had the trial court given proper consideration to these factors, it would have awarded her a greater percentage of the marital estate or it would have invaded plaintiff's separate assets for defendant's benefit. We disagree. When considering a trial court's division of marital property, we review the trial court's findings of fact for clear error. *Pickering v Pickering*, 268 Mich App 1, 7; 706 NW2d 835 (2005). If we uphold the trial court's factual findings, we must decide if the property division was fair and equitable in light of the facts. *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992). We will uphold the trial court's property division unless we are left with a firm conviction that the division was inequitable. *Pickering*, *supra* at 7.

When dividing the martial estate, the trial court's goal is to reach an equitable division of property in light of the circumstances. *Gates v Gates*, 256 Mich App 420, 423; 664 NW2d 231 (2003). The trial court first determines which assets owned by the parties are marital assets and which, if any, are separate assets. *Reed v Reed*, 265 Mich App 131, 150; 693 NW2d 825 (2005). Generally, separate assets are not subject to division between divorcing parties *McNamara v Horner*, 249 Mich App 177, 183; 642 NW2d 385 (2002). However, there are two statutory exceptions to this general rule: separate property may be invaded where the marital estate is insufficient for the suitable support and maintenance of the parties, MCL 552.23, and all or a portion of separate property owned by one spouse may be awarded to the other spouse where the other contributed to the acquisition, improvement or accumulation of the separate property, MCL

552.401. *Reeves v Reeves*, 226 Mich App 490, 494-495; 575 NW2d 1 (1997); *Lee v Lee*, 191 Mich App 73, 78-79; 477 NW2d 73 (1991).

In this case, the trial court determined that assets plaintiff inherited from his mother during the marriage and plaintiff's interest in Liberty Pool Services were his separate property. It then divided the assets constituting the marital estate evenly between the parties, in accordance with defendant's request. On appeal, defendant does not challenge the trial court's division of the marital estate in and of itself. Instead she asserts that the trial court should have invaded plaintiff's separate assets for her benefit and that its failure to do so renders the trial court's property division inequitable.

More specifically, defendant argues that the martial estate was insufficient to provide for her suitable support and maintenance, and therefore, that the trial court should have invaded plaintiff's inheritance for her benefit.[1] We disagree. As noted above, MCL 552.23 permits a trial court to invade separate property where a party establishes a need for additional support beyond that afforded by the marital assets. Defendant asserts that she has a greater financial need than plaintiff because of her lesser earning ability. However, a mere showing of financial disparity between the parties is not sufficient to warrant invasion of separate assets. Defendant does not argue, and did not establish, that the trial court's property division coupled with her ability to earn was insufficient for her support and maintenance. Therefore, defendant has not demonstrated additional need as required by MCL 552.23(1).

Defendant also argues that the trial court erred in refusing to invade plaintiff's separate assets to compensate defendant for her "contribut[ion] to the acquisition, improvement or accumulation" of plaintiff's business interest in Liberty Pool Service. MCL 552.401. After working for other pool companies for some time, plaintiff established his own pool company in 2000. At the time of trial, plaintiff indicated that the business earned between $30,000 and $40,000 per year, that it had no employees, and that its only assets consisted of equipment worth between $5,000 and $6,000. By her own testimony, defendant assisted plaintiff with "a few" pool openings and pool closings in the early days of the business. She also cared for the children and the marital home while plaintiff was working. However, plaintiff cared for the children when defendant worked, typically during evenings and weekends. Given these facts, we cannot say that defendant has established that she contributed to the acquisition, improvement or appreciation of plaintiff's pool business to such an extent so as to warrant invasion of its assets, especially given the very limited nature of those assets. Further, the trial court did consider plaintiff's income from the business when evaluating the parties' respective earning abilities in the context of defendant's request for spousal support. Therefore, this asset was accounted for and considered by the trial court when resolving those issues pertinent to dissolution of the parties' marriage.

In sum, defendant failed to establish that the trial court's division of the marital estate was insufficient for her support and maintenance. Neither did she establish that she made a

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[1] Defendant does not contest the trial court's determination that plaintiff's inheritance was plaintiff's separate asset.

significant contribution to the acquisition, improvement or appreciation of plaintiff's pool business. We therefore conclude that the trial court did not abuse its discretion in rejecting defendant's request that the trial court invade plaintiff's separate assets for defendant's benefit pursuant to MCL 552.23 and/or MCL 552.401. The trial court divided the marital estate equitably between the parties, giving defendant the portion of the marital estate that she requested. We are not left with a firm conviction that the trial court's property division was inequitable. *Pickering, supra* at 7.

Defendant also challenges the trial court's award granting her and defendant joint legal custody of their minor son and daughter and granting plaintiff physical custody of the children. We must affirm a custody order unless the trial court made factual findings against the great weight of the evidence, committed a palpable abuse of discretion, or made a clear legal error on a major issue. MCL 722.28; *Harvey v Harvey*, 257 Mich App 278, 282-283; 668 NW2d 187 (2003), aff'd 470 Mich 186 (2004).

Before trial, based on the recommendation of the Friend of the Court, the trial court entered a temporary order granting plaintiff physical custody of the parties' son and granting defendant physical custody of their daughter. On appeal, defendant claims that, because a trial court may only amend or alter a previous custody order for proper cause or a change in circumstances and because the trial court made no finding that either existed, the trial court erred in holding an evidentiary hearing regarding the custody of the parties' daughter.

A custody dispute is to be resolved in the best interest of the child. *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). A trial court determines the best interest of the child by analyzing the 12 best interest factors listed in MCL 722.23. *Id.* A trial court is required to explicitly state on the record its findings and conclusions regarding each factor. *Treutle v Treutle*, 197 Mich App 690, 694; 495 NW2d 836 (1992).

MCL 722.27(1) provides in pertinent part:

> If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may do 1 or more of the following:
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> (a) Award the custody of the child to 1 or more of the parties involved . . . .
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> * * *
>
> (c) Modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances until the child reaches 18 years of age . . . . The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child.

The first sentence of MCL 722.27(1)(c) only applies to cases in which a party is attempting to alter or modify a previous custody order, such that the trial court would be required to reconsider a previous determination of the best interest factors. *Thompson v Thompson*, 261 Mich App 353, 361; 683 NW2d 250 (2004); *Rossow v Aranda*, 206 Mich App 456, 458; 522 NW2d 874 (1994).

In the present case, when the trial court awarded physical custody of the parties' daughter to plaintiff, it did not *reconsider* a previous determination of the best interest factors. Rather, this custody award resulted from the trial court's first evaluation of the best interest factors. When the trial court signed the temporary order before trial, it did not consider the best interest factors; the temporary order was based solely on the recommendation from the Friend of the Court and was to establish custody of the parties' children only until a judgment of divorce was entered. Thus, because the trial court did not alter or amend a previous custody order that was based on the best interest factors, the requirement to show proper cause or a change of circumstances did not apply to the trial court's award of physical custody of the parties' daughter to plaintiff as part of the divorce judgment. *Thompson, supra* at 361.

Defendant further claims that the trial court erred in determining that a joint custodial environment existed with regard to the parties' daughter and that it erred in awarding custody of the parties' children to plaintiff. We are required to affirm a trial court's factual findings regarding the existence of an established custodial environment and each best interest factor unless the findings are against the great weight of the evidence. *Vodvarka v Grasmeyer*, 259 Mich App 499, 507; 675 NW2d 847 (2003). Defendant has provided us with no basis for determining that the trial court's factual finding are against the great weight of the evidence. Because we will not search the record for factual support for a party's claim, *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 388; 689 NW2d 145 (2004), we affirm the trial court's factual findings. Further, because the trial court found that, in regard to the best interest factors, the parties were equal or plaintiff was favored, we cannot say that the trial court abused its discretion in granting custody of the parties' children to plaintiff. We affirm the trial court's custody award.

We affirm.

/s/ Jane E. Markey
/s/ David H. Sawyer
/s/ Richard A. Bandstra